VINCENT BARNARD

IBLA 82-453 Decided August 4, 1982

Appeal from decision of the Montana State Office, Bureau of Land Management, requiring the reservation of oil and gas in a homestead patent unless the claimant furnishes conclusive evidence that the lands are not valuable for oil or gas. GF 053893.

Affirmed as modified.

1. Application and Entries: Valid Existing Rights-- Homesteads (Ordinary): Generally--Reclamation Homesteads: Generally--Reclamation Lands: Generally-- Withdrawals and Reservations: Reclamation Withdrawals

   Where a homestead entry is on land within a second-form reclamation withdrawal, and compliance with the provisions of the reclamation laws is still required, the mere filing of ordinary homestead final proof is not sufficient to vest the entryman with equitable title.

2. Application and Entries: Valid Existing Rights-- Homesteads (Ordinary): Generally--Reclamation Homesteads: Generally--Reclamation Lands: Generally-- Withdrawals and Reservations: Reclamation Withdrawals --Withdrawals and Reservations: Revocation and Restoration

   The revocation of a second-form reclamation withdrawal is effective upon the date specified in the order of revocation, regardless of whether the land had ever been suitable for the purpose for which it was withdrawn. Where an entryman has complied with all the requirements of the ordinary homestead law, but not with the requirements of the reclamation law, the revocation of the reclamation withdrawal does not operate retroactively to vest

equitable title in the entryman as of the time final proof under the ordinary homestead law was submitted. Such equitable title cannot be deemed to have vested prior to the effective date of the revocation of the withdrawal.

3. Withdrawals and Reservations: Revocation and Restoration

Where the Secretary has not expressly made revocation of a withdrawal retroactive, the Board of Land Appeals lacks authority to give the revocation retroactive effect.

4. Application and Entries: Generally--Homesteads (Ordinary): Generally--Mineral Lands: Mineral Reservation--Mineral Lands: Nonmineral Entries-- Reclamation Homesteads: Generally--Reclamation Lands: Generally

A waiver of mineral rights pursuant to 30 U.S.C. §§ 121-123 (1976) is properly required where there is a finding that land within a reclamation homestead entry is valuable for one of the minerals specified in that Act prior to the submission of reclamation final proof and other compliance with the law, even though ordinary homestead final proof was accepted many years before. Where the entryman or his successor in interest executed the waiver rather than appeal the decision requiring it, the waiver is binding on all successors in interest.

APPEARANCES: John W. Ross, Esq., Billings, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Vincent Barnard has appealed the December 16, 1981, decision of the Montana State Office, Bureau of Land Management (BLM), requiring a reservation of oil and gas before a patent is issued for homestead entry GF 053893, unless appellant furnishes conclusive evidence that the land is not valuable for oil or gas. Appellant contends that equitable title to the entry was earned upon submission of final proof of compliance with the homestead law on May 25, 1915. There had been no determination at that time that the land was valuable for oil or gas, so appellant contends that he is entitled to a patent free of the reservation of those minerals.

BLM explained its reasons for including a mineral reservation in the patent in a letter dated December 4, 1981. It pointed out that the land was entered as a reclamation homestead, not an ordinary homestead, and that the mineral character of the land had been determined while the land was still subject to the requirements of the reclamation law, no reclamation proof having been submitted.

Appellant contends that the reclamation requirements should not have been applied to the entry, and that the revocation of the reclamation withdrawal required the Department to recognize the right to a patent as having vested upon submission of final proof in 1915. A brief chronology of the actions taken with respect to this land will demonstrate the correctness of requiring a reservation of oil and gas in a patent issued to Barnard.

The land at issue was originally withdrawn for reclamation purposes in the Milk River Irrigation Project by Departmental Order dated August 18, 1902. This was a second-form reclamation withdrawal, which precluded entry of the land except under the provisions of the homestead laws. Act of June 17, 1902, ch. 1093, § 3, 32 Stat. 388. 1/ The Reclamation Act provides that all such withdrawn lands entered and entries made under the homestead laws are subject to various provisions of the reclamation law. 43 U.S.C. §§ 416, 432 (1976).

On April 15, 1910, Charles T. Yeatts filed an application for homestead entry of the subject land. On November 28, 1913, he filed a petition for restoration of the subject land, describing it as "'essentially arid and nonirrigable' and not susceptible to irrigation from any other known source of water supply." If this petition had been granted, the entry would no longer have been subject to the reclamation requirements. The petition, however, was addressed to the Commissioner of the General Land Office, not the Director of the Reclamation Service, who had jurisdiction over that matter. Although informed that he had misdirected his petition, Yeatts did not pursue restoration with the Reclamation Service.

Yeatts sought revocation of the withdrawal with respect to this land and other lands he had applied to enter under the provisions of the Enlarged Homestead Act. A letter from Clay Tallman, Commissioner, General Land Office, to Representative Tom Stout, dated February 29, 1916, states that this application was withdrawn on January 7, 1915. The record shows no further effort directed at the revocation of the reclamation withdrawal until appellant filed his application in 1976.

1/ This section was codified as 43 U.S.C. § 416 (1970). Section 704 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792, deleted the Secretary's authority to make reclamation withdrawals under 43 U.S.C. § 416 (1970). However, this repeal did not affect the reclamation withdrawals existing on that date, which are instead expressly continued, subject to review by the Secretary, under section 204 of FLPMA, 43 U.S.C. § 1714 (1976). William C. Reiman, 54 IBLA 103 (1981); Sam McCormack, 52 IBLA 56 (1981).

Yeatts filed his final proof of compliance with the requirements of the ordinary homestead law on May 28, 1915. On January 25, 1916, the General Land Office notified Yeatts that the final proof was sufficient as to the residence, cultivation, and improvements required by the ordinary provisions of the homestead law. The notice advised Yeatts that a patent would issue upon proof of reclamation and payments of all water-rights charges due at the date of patent.

The land was included in petroleum reserve No. 53, Montana No. 6, as of January 9, 1917. It was included in the known geological structure of a producing oil and gas field defined on June 30, 1930, and redefined on January 9, 1961. On July 31, 1942, the land office issued a decision requiring the owner of the land to file a consent to the reservation of oil and gas to the United States or to file an application to disapprove the classification of the land as valuable for oil or gas. The decision stated that failure to take either action would result in cancellation of the entry. J. T. Barnard, appellant's predecessor in interest who had purchased the entry from the estate of Yeatts, consented to the amendment of the homestead application to reserve to the United States all the phosphate, nitrate, potash, oil, gas, or asphaltic mineral deposits in the land embraced in the application. Oil and gas lease GF 085055 was issued in 1942 and included all the land within appellant's entry. At present, half of the land within the entry is still subject to this lease, which is in producing status.

As no final reclamation proof had ever been filed, the land remained unpatented. During the late 1950's and 1960's the Department sent several notices to appellant notifying him that the land had not been patented and encouraging him to complete the action necessary to obtain a patent. The water rights for the land were removed by reclassification in 1955, according to a January 22, 1976, letter from the Bureau of Reclamation. On January 29, 1976, appellant requested revocation of the reclamation withdrawal. The revocation was dated May 18, 1981, and made effective on May 27, 1981. Public Land Order No. 5916, 46 FR 28406 (1981).

Although land within a second-form reclamation withdrawal was open to homestead entry, subject to compliance with the provisions of the reclamation laws, entry was still restricted to nonmineral land and no patent could issue for land which was mineral in character. Appellant correctly points out that the date for determination of whether the land is mineral in character is the date on which equitable title has vested in an entryman, i.e., when the entryman has completed all that the law requires him to do. See Stockley v. United States, 260 U.S. 532 (1923). Early in this century, Congress enacted various statutes which permitted agricultural entries on lands valuable for specified minerals, but which required that patents issued for such lands reserve the specified minerals to the United States. In 1909 and 1910, statutes were enacted providing for reservation of coal. 30 U.S.C. §§ 81, 83-85 (1976). A statute enacted in 1914 provided for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic materials. 30 U.S.C. §§ 121-123 (1976). Previously, mineral lands had been subject to disposition only under the mineral land laws; these statutes, however, enabled entrymen to obtain surface rights to lands valuable for the specified minerals, and thus opened land which would otherwise have been closed to nonmineral entryman. Under 30 U.S.C. § 123 (1976), where

lands entered under the nonmineral land laws are subsequently reported to be valuable for the minerals specified in that Act, the entryman may receive a patent, upon satisfactory proof of compliance with the laws under which the lands are claimed, but that patent must contain a reservation to the United States of those minerals. Garth L. Wilhelm, 62 I.D. 27, 29 (1955). In Brennan v. Udall, 379 F.2d 803 (10th Cir.), cert. denied, 389 U.S. 975 (1967), the 1914 Act was held to be applicable to entries made prior to its enactment. Of course, it is true that a mineral waiver cannot be required where an entryman has acquired equitable title before known conditions come to light that would engender the belief that the land is valuable for such minerals. See L. S. Mansfield, 57 I.D. 232 (1941). Thus, the appropriateness of reserving minerals to the United States depends on when equitable title passed to the entryman.

[1] Appellant contends that equitable title passed when ordinary homestead proof was submitted in 1915. As we noted above, equitable title passes when the entryman does everything that the law requires him to do to earn a right to a patent for the land. Nevertheless, the land at issue had been subject to a reclamation withdrawal for almost 8 years prior to Yeatts' entry. On the date of his entry, Yeatts was under official notice that no equitable title to the land could be earned by compliance with the provision of the ordinary homestead laws alone; reclamation requirements also must have been met. His act of entry itself constitutes acceptance of these conditions. Although Yeatts had asked the Commissioner of the General Land Office to restore the land to the public domain, he was informed that his request should be addressed to the Director of the Reclamation Service. The record reflects no further pursuit of the matter by Yeatts or his successors until 1976, 6 decades later. When Yeatts submitted his final proof of compliance with the ordinary homestead laws, the land office notified appellant of its acceptance of his proof but advised him that the proof submitted was subject to the Reclamation Act. Because the land remained within a reclamation withdrawal and compliance with the provisions of the Reclamation Act was still required, the mere filing of ordinary homestead proof was not sufficient to vest the entryman with equitable title. Irwin v. Wright, 258 U.S. 219, 229 (1922); Garth L. Wilhelm, supra; David C. Caylor, 60 I.D. 333, 337 (1949). These requirements were never met, so the earliest date on which equitable title could vest would be the effective date of the order lifting these requirements from the entry.

[2] Appellant contends that the effective date of the revocation should relate back to the date that the reclamation requirement was imposed, because the land was never subject to irrigation. The terms of the revocation notice itself, however, indicate that it was to operate prospectively, not retroactively. Although it was dated May 18, 1981, it did not become effective until May 27. In general, where an order revoking or modifying a withdrawal specifies that it is to be effective on a future date, the status of the land remains unchanged until that date, and the land remains closed to the types of entires from which it has been withdrawn. David W. Harper, 74 I.D. 141, 145 (1967); Mary E. Brown, 62 I.D. 107 (1955). Even where the purpose of a withdrawal cannot be met, it generally bars disposal of the land while it remains in effect. See Robert A. Adams, 57 IBLA 370 (1981); Roy Leonard Wilbur, 61 I.D. 157 (1953). Restoration of land from withdrawal does not operate to validate retroactively applications or entries made during the

withdrawal. See Paul D. Tony, 43 IBLA 245 (1979); J. P. Hinds, 25 IBLA 67, 83 I.D. 275 (1976); Roy Leonard Wilbur, supra. To hold otherwise would make withdrawals an ineffective land management tool since those seeking entries barred by the withdrawal would be encouraged to enter the land anyway if they believed that their entries could be validated by the future revocation of the withdrawal.

We do not believe that the facts of this case warrant a departure from these well established principles. Although the land involved in the instant appeal was open to homestead entry, it was only open subject to the provisions of the reclamation laws. In effect, the land was closed to ordinary homestead entry outside of the reclamation context. Yeatts had never appealed the January 25, 1916, notification that his entry was still subject to the reclamation laws. Whatever rights he may have asserted then are now lost. See Garth L. Wilhelm, supra. Accordingly, we hold that the revocation of a second-form reclamation withdrawal is effective upon the date specified in the order of revocation, regardless of whether the land had ever been suitable for the purpose for which it was withdrawn. Where an entryman has complied with all the requirements of the ordinary homestead law but not with the requirements of the ordinary reclamation law, the revocation of the reclamation withdrawal does not operate retroactively to vest equitable title in the entryman as of the time final proof under the ordinary homestead law was submitted. Such equitable title cannot be deemed to have vested prior to the effective date of the revocation of the withdrawal.

[3] Moreover, this Board does not have authority to vary the terms of the revocation of the withdrawal issued by Assistant Secretary Carruthers. Under 43 U.S.C. § 1714(a) (1976), a withdrawal can be revoked or modified only by an individual in the Office of the Secretary who has been appointed by the President with the advice and consent of the Senate. Where such an individual has not revoked a withdrawal retroactively, this Board lacks authority to give the revocation retroactive effect.

[4] A mineral reservation is properly required in appellant's patent because he is bound by the waiver filed by his predecessor in interest. Appellant's attack on this waiver comes too late. See Brennan v. Udall, supra. A waiver of mineral rights pursuant to 30 U.S.C. §§ 121-123 (1976) is properly required where there is a finding that the land within a reclamation homestead entry is valuable for one of the minerals specified in that Act prior to the submission of reclamation final proof and other compliance with the law, even though homestead final proof was accepted many years before. See Avery S. Hobson, A-30332 (June 24, 1965); Garth L. Wilhelm, supra. Appellant argues that the waiver is void for failure of consideration, contending that the waiver was based on an expectation that the Government would provide irrigation facilities to provide reclamation to the land. This contention is without merit. As noted above, mineral land is not subject to disposal under the homestead laws. If entered land is valuable for a mineral listed in 30 U.S.C. §§ 121-123 (1976), the only choice an entryman has is to execute the waiver required by that Act, or face cancellation of his entry. J. T. Barnard did not dispute the mineral determination and filed the waiver. If he believed that the condition was improperly imposed upon him, he could have appealed the decision. By his failure to do so, he lost whatever rights he had. See Garth L. Wilhelm, supra.

In conclusion, the patent must include a mineral reservation for several reasons. The land had been determined to be valuable for minerals at a time when the entryman and his successors in interest had not fulfilled the requirements for obtaining a patent under the reclamation homestead law. The land was subject to those requirements from the date of withdrawal in 1902 until the effective date of revocation of the withdrawal in 1981. To hold that the revocation of this withdrawal operated retroactively is contrary to Departmental precedent and beyond the authority of this Board. We must also stress that the applicability of the reclamation requirements went unchallenged for 60 years prior to the filing of appellant's application for revocation of the withdrawal, during which time a waiver of rights to certain minerals including oil and gas had been filed, and an oil and gas lease issued.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed with the modification that the reservation should include all of the minerals in the waiver executed by J. T. Barnard.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge